United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

74-2382/74-2387

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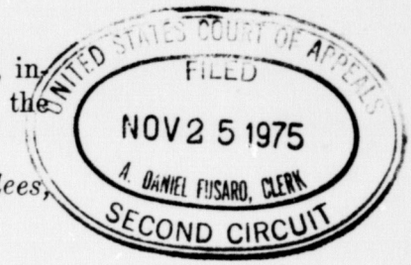
United States Court of Appeals
FOR THE SECOND CIRCUIT



JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellants-Appellees,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,

Defendants-Appellees-Appellants,

MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellees.

PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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9

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	2
DECISION	5
BASES FOR REHEARING AND REHEARING EN BANC	6
CONCLUSION	

Table of Cases

MORRISSEY v. CURRAN, 302 F. Supp. 32 (SDNY, 1969); aff'd in part, reversed in part, 423 F.2d 393; cert. denied, 399 U.S. 928 (1970), 400 U.S. 862 (1970); on remand 336 F.Supp. 1107 (SDNY, 1972); 351 F.Supp. 775 ..... 2, 3, 4, 5, 7, 8, 9, 10, 12, 13, 15, 17, 18

CITY OF DETROIT v. GRINNELL, 495 F.2d 448 ..... 6, 16, 23

YABLONSKI v. UMW OF AMERICA, (C.A.D.C.) 454 F.2d 1036 ..... 20, 21

HASBROUCK v. TYMKEVITCH (Third Dept), 25 A.D. 2nd 187 (1966) 22

THE HOLY BIBLE, St. Matthew, 6:24 23

Statutes and Rules

Federal Rules of Appellate Procedure:

Rule 35 1

Rule 40 1

29 U.S.C. §501 ..... 2, 11, 12, 23

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

- against -

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN, MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees.

- -x

PETITION FOR REHEARING AND FOR REHEARING EN BANC

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, plaintiffs hereby petition this Court for a rehearing of certain parts of the appeal in this action, and pursuant to Rule 35 of the Federal Rules of Appellate Procedure, respectfully suggest that such rehearing be held en banc.

STATEMENT OF FACTS

This action was brought on behalf of the membership of the National Maritime Union of America (NMU) under Title 29 United States Code §501 (LMRDA section 501).

The complaint charged that improper payments had been made to the Officers' Pension Fund (OPF) and that improper payments had been made from that fund to William Perry and others. The following judgments were ultimately obtained: A judgment in favor of NMU for $674,222.60 which was paid by the OPF; a judgment in favor of the OPF for $263,307.00 against William Perry which has not yet been paid; and a judgment in favor of the OPF for $272,740.50 against Abraham E. Freedman representing monies wrongfully paid by OPF to William Perry with interest, which has been paid.

The District Court in a relatively early stage of this litigation, upon remand from this Court entered an order on July 8, 1970 providing:

> "The defendants are enjoined from employing counsel paid or to be paid with union funds."

This order was made at the suggestion of this Court (opinion by Anderson, C.J.). Morrissey v. Curran, 423 F.2d 393 at page 400:

> "As the district court apparently did not pass on so much of plaintiffs' motion as requested that defendants be enjoined from retaining counsel paid or to be paid with Union funds, this question should also be determined on remand. The controlling cases on this point are Tucker v. Shaw, supra and Holdeman v. Sheldon, 311 F.2d 2 (2 Cir. 1962), in which we held that all that is necessary for enjoining the defendants in a §501 action is that the plaintiff make 'a reasonable showing that he is likely to succeed.'"

The defendants did employ counsel who thereafter were paid $290,144.89 from union funds (Joint Appendix p. 110a).

The breakdown of those payments are:

1. Mr. Segal and Mr. Karchmer's lawyers were paid sums totalling $167,644.45 for services rendered in this action.

2. Mr. Freedman's lawyers (who also represented Messrs. Curran and Wall) were paid sums totalling $85,829.11 for services rendered in this action. The NMU paid $29,611.49

for the conduct of proceedings supplementary to judgment in a futile effort to collect a judgment against Perry. As Judge Hays observed in his dissenting opinion at p. 6475:

> "Similarly the supplemental proceeding undertaken to collect the judgment against Perry, which if successful would have satisfied the judgment against Freedman, clearly operated for Freedman's personal benefit and he, not the trust fund, should bear the expense."

3. The Wilkie firm was paid the sum of $7,059.84 for an opinion apportioning the fees paid to the attorneys representing Freedman between Freedman individually and Freedman as trustee.

4. In addition to the $290,144.89, enumerated, the attorneys for Messrs. Karchmer and Segal back in June of 1974 were preparing a bill to be paid from union funds for an additional fee in excess of $19,500.00.

The judgment from which the instant appeal was taken specifically provides at 155a:

> "ORDERED, that as to any statements rendered to defendant Martin Segal for attorneys' fees and disbursements incurred in this action subsequent

> to June 30, 1973 defendant Segal shall pay 39% of such amount and the NMU Officers' Pension Fund shall pay 61% of any such amount; and it is further
>
> ORDERED, that as to any statement rendered to defendant Leon Karchmer for attorneys' fees and disbursements incurred and to be incurred by him in this action subsequent to June 30, 1973, defendant Karchmer shall pay 39% of any such amount and the NMU Officers' Pension Fund shall pay 61% of any such amount ***"

This order, and its affirmance by this Court, in effect issues a blank check to be drawn on NMU funds after June 30, 1973.

We respectfully suggest that these decretal paragraphs must have been overlooked by the majority in rendering its opinion of November 14, 1975.

DECISION

The July 8th Order enjoined the defendants from employing counsel "paid or to be paid with union funds." When plaintiffs learned that the defendants had employed counsel who were paid from union funds they asked the District Court to punish the defendants for contempt and to impose sanctions.

The District Court refused to punish the defendants, but did grant the plaintiffs' application to the extent of directing that Karchmer and Segal refund 39% of their attorneys' fees which had already been paid out of union funds (the OPF).

The District Court made this determination without a Grinnell hearing. It simply accepted the defendants suggestion that the fees be apportioned on the basis of the dollars involved in each issue.

The majority of this Court affirmed with a minor modification. Circuit Judge Hays filed a dissenting opinion.

BASES FOR REHEARING AND REHEARING EN BANC

I

This case is of exceptional importance under the LMRDA.

The haunting doubt lingers: Do the same rules apply to storefront lawyers in Bronx and Brooklyn as to

the august counsel who appeared for the several defendants in this case?

If those rules do apply equally, does this case toll the death knell to the admonition that has governed lawyers' behavior since the memory of man runneth not to the contrary - a faithful servant cannot serve two masters.

The language of the order of June 8th was clear and unequivocable:

> "The defendants are enjoined from employing counsel paid or to be paid with union funds."

That order was clear enough and left no room for doubt as to its meaning. However, it gave no pause to the defendants.

Defendants Curran and Wall, despite that order, employed Bloom & Epstein, as their counsel, who were paid, without a hearing and court order, $85,829.11 out of union funds. From all that appears, Curran and Wall paid nothing.* Did that comply with either the letter or with the spirit of the order of July 8th?

---

* This fact is expressly recognized in footnote 12 at p. 6473. It is most baffling because they surely were being defended and should have paid something - particularly when we consider the order of July 8, 1970. Had they paid something, there would be less to complain about.

Defendant Freedman also employed Bloom & Epstein. He was held to have been guilty of willful misconduct or to use the language of this Court "reckless indifference to his duties as a Trustee."* He and his attorneys were in a conflicting position to the NMU as will hereinafter appear. In addition, $29,611.49 were paid from union funds to counsel who were attempting to pull Mr. Freedman's chestnuts from the fire in conducting proceedings supplementary to judgment against Mr. Perry. Mr. Freedman was equitably subrogated to the rights of OPF against Perry.

Defendants Segal and Karchmer employed counsel who were paid jointly $167,644.45 out of union funds despite the July 8 order.

The order of July 8th was designed to prevent exactly what happened here for it anticipated that the defendants would be in a conflicting position. The conflict arose as follows:

---

* How this holding of "reckless indifference to his duties" can be reconciled with the new finding by the majority that he was "substantially absolved" (p. 6472) also presents a problem in this case. We respectfully suggest, that Mr. Freedman was not "substantially absolved".

It was in the interest of the union to recover the money from the OPF but it was in the interest of the defendants to show, if they could, that the money had been properly paid - thereby avoiding a possible surcharge. It was in the interest of the OPF to recover the money from William Perry but it was in the interest of the defendant trustees to show, if they could, that the money had been properly paid to William Perry - thereby avoiding a surcharge. Patently, the same attorney could not argue from one corner of the mouth, that the money had been properly paid and that there should be no surcharge; while, at the same time, argue from the other corner that the money had been improperly paid and should be recovered, primarily from Perry, who had profited from the misapplication of funds and from the trustees who had so misapplied the funds.

Judge Hays in his dissent said at p. 6474:

> "Throughout this litigation the personal interests of the individual trustees were in conflict with their responsibilities as fiduciaries of the trust fund to recover any union funds improperly expended. Their object was to protect themselves against a surcharge for any unlawful payments; to accomplish

this end they hired their own lawyers and, in view of the outcome of this litigation, should be responsible for the full amount of the attendant counsel fees. See Highway Truck Drivers and Helpers Local 107 v. Cohen, 215 F. Supp. 938, 941 (E.D.Pa. 1963), aff'd 334 F.2d 378 (3rd Cir.), cert. denied, 379 U.S. 921 (1964) (Highway Truckers II). See also, Kerr v. Shanks, 466 F.2d 1271, 1277 (9th Cir. 1972); Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962) (per curiam); Koonce v. Gaier, 320 F. Supp. 1321, 1323-24 (S.D.N.Y. 1971). All legal services paid for with union funds were rendered on behalf of the individual defendants. In this case, no lawyer could ethically represent both the trustees and the trust in view of the divergence of their respective interests. Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962); Highway Truckers II, supra, 215 F. Supp. at 940. Cf. Yablonski v. United Mine Workers of America, 454 F.2d 1036, 1041-42 (D.C. Cir. 1971), cert. denied, 406 U.S. 906 (1972). As the district court stated in a similar situation in Highway Truckers II:

> 'None of the payments were received for the benefits conferred on the union. Such payments would have constituted a breach of legal ethics if retained in matters where the union and defendants had conflicting interests.' 215 F. Supp. at 940.'"

II

Had the order of July 8th, which had been entered at the suggestion of this Court been applied, one attorney could have been more economically retained to represent the NMU funds and protect its interest.* That did not happen.

Now three separate defendants paid their counsel from union funds. When this fact was unearthed by the plaintiffs and redress sought, what happened? Bloom and Epstein now claim to have alone done all of the work which resulted in benefit to union funds. For that they say, and

* To illustrate our concern, Mr. Morrissey has brought a subsequent action on behalf of the NMU membership pursuant to section 501 against all the several national officers of the NMU and against Mr. Freedman for breaches of their fiduciary duties, not encompassed within this suit primarily because these breaches were later discovered. Mr. Freedman's firm has appeared in that action for seven defendants.

Should the plaintiff move to enjoin the defendants in that action from employing counsel paid or to be paid with union funds and should that motion be granted - as we expect it would be, that motion designed to conserve union funds could multiply the expenditures of the union. That would presumably follow even if plaintiff were to succeed in proving 75% of his case against the several defendants.

Each of their counsel could then come back to this court with the same specious argument which defendants have here presented and ask for 7 x 25% or 175% of a fee for their defense beneficial to the union. We respectfully suggest that that is not a consumation devoutly to be wished.

No plaintiff aware of this case acting in good faith would seek such relief.

the court now agrees, they should get 60% of their fee paid from union funds. While the other two do not dispute this statement, they nevertheless claim, and have been allowed, 61% of their fee from union funds.

Once again, Judge Hays recognized this. He said at p. 6475

> "Imposing counsel fees upon the fund also ignores the fact that the work of each defendants' counsel was duplicative of the work of the other counsel employed and that any benefits which may have accrued to the fund from the services of these attorneys were purely incidental to the protection of the defendants' individual claims."

Thus attorneys for the defendants have been allowed what they admit amounts to 182% of what one fee would have been for the same work. We think it is substantially more than that.

There is grave danger then that a plaintiff in successfully removing union counsel from defending §501 defendants would only increase the exposure of the union for legal fees.

III

We are particularly concerned with the majority opinion which says at pp 6472:

> "We emphasize, in contrast to the cases cited by plaintiffs, that defendants here sought reimbursement for their attorneys' fees only after the close of the litigation on the merits. *** Concern that the union subsidization of attorneys' fees will represent new bounty to alleged malefactors or enable officer-defendants financially to overwhelm the §501 plaintiff is inapposite where, as here, the lawsuit has already terminated and the trustees have been substantially absolved. *** Nor, in this posture, need we confront the potential conflict of interest which might have existed had the trustees' counsel fees been prepaid by the trust. *** Presented only with an issue of reimbursement, we have had the benefit of hindsight in sorting out those interests of the fund and the defendants which are compatable and which are not."

It is true that in this case the plaintiffs were not overwhelmed by the defense. But there should be "concern that the union subsidization of attorneys' fees will" in other cases following this one "represent new bounty to alleged malefactors or enable officer-defendants financially to overwhelm the 501 plaintiff."

The majority was mistaken when it said that the payments were not made until the law suit was already terminated. These payments were made covertly during the action, in the face of the order of July 8th and were indeed prepaid by the trust. It was only the plaintiffs' diligence which brought these payments to light. This is not the case of a defendant coming willingly to court after the litigation has been concluded seeking reimbursement. Here the defendants were dragged in by their heels by virtue of plaintiffs' motion to have sanctions imposed upon them.

True enough this Court did have the benefit of seeing what had already been paid out of union funds to defendants' counsel despite the July 8th order. But we cannot place sufficient emphasis on the fact that had it not been for the action of the plaintiffs the Court would never have had the benefit of any view - hindsight or otherwise. The defendants would have gotten off scott free of any legal charges despite the July 8th order.

We respectfully suggest that to place such a burden on the District Courts - sifting out the wheat from the chaff in every case such as this - is asking too much. And to permit the District Courts to accept what defendants' attorneys say in affidavits and opinion letters without a hearing on the subject - is asking too little.

IV

The judgment appealed from provides that in addition to the money already paid (supra) 61% of all the legal expenses of Messrs. Karchmer and Segal since June 30, 1973 should be borne by the OPF. We know that for that 2-1/2 year period there was substantial work done for the benefit of those defendants personally by their lawyers who, as it has been demonstrated, are not inexpensive. We know of no work during that period that has been done for the benefit of any NMU fund by defendants' lawyers.

The majority opinion in footnote 7 says

> "Plaintiffs' papers suggest that there may be additional claims relating to still other counsel fees paid by the fund which are not before us on this appeal. Any such claims should be determined by the District Court in accord with the provisions enunciated in this opinion."

We respectfully suggest that the percentage payments of 61% hereinbefore referred to (supra p. 4) are before this Court now and should be passed upon.

In any event, we are satisfied that this point of future percentage payments out of a union fund to the attorneys for Karchmer and Segal must have been overlooked.

This Court would not have let such an item slide by, without at the very least asking - "How much?".

V

Consideration by the full Court is necessary to secure and maintain uniformity of its decisions. The decision of this Court which allows defendants' counsel to be paid on the basis of affidavits submitted and on the basis of a letter from the Wilkie firm is not in accord with the teachings of City of Detroit v. Grinnell, 495 F.2d 448 in which Moore, C.J. said at page 473:

> "There is no doubt that in a case such as this, where there were many vigorous disputes of fact over the elements that comprised the fee award, an evidentiary hearing, complete with cross-examination, is imperative."

Had a Grinnell hearing been held, the Wilkie firm would have been subjected to cross-examination on its opinion letter. No doubt their opinion would have been

changed when confronted with the fact not theretofore disclosed to them, that Bloom & Epstein had previously been paid over $50,000. Nor were they given the "Dear Abe" letter (infra) and to be sure that also would have influenced their opinion and required a change.

VI

At page 6468, footnote 9, the majority indicates that "none of the parties has raised any question to the reasonableness of the legal fees charged in this case." We have questioned the reasonableness of the charge to the union for the work that was done.

We have done this by stating that the allocation of 39% and 61% was completely unreasonable and unrealistic for the simple work done for the union.

As Judge Hays observed in the footnote at page 6475:

> "Even if allocation were somehow justifiable, plaintiffs are correct in their contention that the method of allocation advanced by defendants is without basis in fact. In reaching the 61-39% figure utilized below, defendants

> first made an allocation between 'work specifically performed with respect to the issue of personal liability' and other services. This division was impermissible since 100% of the services were performed in order to protect the individual defendants from personal liability. Defendants next attempted to calculate that portion of the 'personal liability'fees which were attributable to the Perry payment by applying a percentage obtained by dividing the dollar amount of the Perry claim, $222,200, by the total amount of money improperly paid to non-officers, $371,271. This suballocation is also unjustifiable. It relies entirely upon the tenuous presumption that there is a necessary correlation between the monetary size of a claim and the legal work required to support or refute it, while ignoring such critical factors as the complexity of the relevant legal issues and the amount of difficulty encountered and time spend in their resolution."

Perhaps our opposition to the reasonableness of the charge to the union was not artistically raised. We had certainly intended to raise it.

We have consistently said that even if all the other disabilities are overlooked or disregarded - under no circumstances should more than one fair fee be charged to the trust. Naturally we have no concern whatever about the amount the individuals pay. That is between them and their lawyers. We think it is irrelevant.

VII

Finally, we cannot understand how, after Karchmer and Segal's letter of December 21, 1972, any payment to Mr. Freedman's attorney could be made.

That letter reads:

"December 21, 1972

"Dear Abe:

"In a discussion with Simpson, Thacher & Bartlett, with respect to various matters relating to the captioned litigation, we talked about the bills from legal counsel. This brought us to the question of the recent bill from Bloom & Epstein. It was the opinion of our counsel that there was a legal question as to whether we can approve the Bloom & Epstein bill for payment in view of Judge Bonsal's decision. Counsel advised us that the bill can be paid after your appeal is won.

"We want to approve the Bloom & Epstein bill. However, in view of the court's general and specific positions in this litigation and the need to avoid any possibility of our having to defend allegations based on the fact that we didn't seek independent legal advise and follow it, we have no alternative but to withhold approval of the Bloom & Epstein bill, at least for the present. Because there is a legal question as to the propriety of the Trustees approving this bill, we would be satisfied with a legal opinion from an independent attorney - like Judge Rifkin - advising the Trustees that the Bloom & Epstein bill can be approved for payment.

"As you can imagine, Abe, we are very troubled by the turn of events. However, we have no sensible alternative but to follow the advice of our legal counsel.

"With every good wish.

Sincerely,

Martin E. Segal/Leon Karchmer"

Despite the fact that Freedman's appeal was lost, not won, that bill was later paid and approved by both the District Court and by the majority of this Court.

VIII

We respectfully suggest that this Court, after its en banc deliberation, should not deviate from the teachings of Yablonski v. UMW of America, (C.A.D.C.) 454 F.2d 1036. There as here counsel paid with union funds had undertaken to represent individual defendants. At page 1041 the Court said:

"Where, as here, union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by independent counsel, unincumbered by potentially conflicting obligations to any defendant officer."

At the same page:

> "*** in trying to achieve a valid definition of an institution's interest, it would seem that counsel charged with this responsibility should be as independent as possible."

At the same page:

> "*** counsel for UMWA should be diligent in analyzing objectively the true interest of UMWA as an institution without being hindered by allegiance to any individual concerned."

And at page 1039:

> "*** representation of a labor union by counsel free of possibly conflicting obligations to adverse parties is directly related to attainment of the goals Congress envisioned when it passed the Labor-Management Reporting and Disclosure Act of 1959."

And at page 1042:

> "In sum, a sine qua non of permissible union representation in a Section 501 action is the absence of any duty to another that might detract from a full measure of loyalty to the welfare of the union."

See also Canon 5:

> "EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

The effect of the dual relationship of each of the attorneys for the defendants cannot better be stated than in the language of Justice Aulisi in Hasbrouck v. Tymkevitch (Third Dept), 25 A.D. 2nd 187, 1966 at p. 188-189:

> "It is fundamental that an agent cannot take unto himself incompatible duties, or act in a transaction where he represents a person having an adverse interest. Where he does act for adverse interests he must necessarily be unfaithful to one or the other as the duties which he owes to his respective principals are conflicting and incapable of faithful performance by the same person. No man can serve two masters (2 N.Y. Jur., Agency, §203; Lamdin v. Broadway Surface Adv. Corp., 272 N.Y. 133; Elco Shoe Mfrs. v. Sisk, 260 N.Y. 100, 103; Klein v. Twentieth Century-Fox Int. Corp., 201 Misc. 132, affd. 279 App. Div. 989). The rules apply irrespective of good or bad faith and it is quite immaterial that there may have been no intention to defraud (Carr v. National Bank & Loan Co., 167 N.Y. 375, affd. 189 U.S. 426; Matter of People [Bond & Mtge. Guar. Co.], 303 N.Y. 423, 431). As Judge Rapallo long ago said in Bain v. Brown (supra, pp. 288-289): 'When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.'"

Or as written in The Holy Bible, St. Matthew, 6:24:

> "No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."

CONCLUSION

This case qualifies for en banc treatment for the following reasons:

1. It is extremely important to the bar generally with respect to their duties not to engage in the representation of conflicting interests.

2. It is extremely important with respect to all Section 501 actions and the effect which should be given to orders enjoining Section 501 defendants from employing counsel paid or to be paid with union funds. In other words, will such orders, once obtained, be enforced.

3. Consideration by the full Court is necessary to secure and maintain uniformity with its decisions. This decision is at odds with Grinnell.

4. The majority opinion raises questions which should be decided by the entire court.

5. The Supreme Court has admonished the Courts of Appeal to make use of the en banc procedure.

6. There are no compelling reasons for not hearing the case en banc.

7. Rehearing should be had on the allowance of the payments (61%) to Karchmer and Segal's lawyers after June 30, 1973 of an unliquidated amount payable from union funds.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on November 25, 1975, she served 2 copies of Petition for Rehearing and for Rehearing En Banc
on

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by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
25th day of November, 1975

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932950
Qualified in Nassau County
Commission Expires March 30, 1977